# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT.

OF THE

# STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1822.* East'n District. *June*, 1822.

*HUNTER'S SYNDICS* vs. *HUNTER & AL.*

HUNTER'S SYNDICS vs. HUNTER & AL.

APPEAL from the court of the first district.

Service of a judgment on the surety, who bound himself for the forthcoming of a negro or his value, on the judgment, notwithstanding a demand does not work a forfeiture of the penalty, if the negro be within a reasonable time surrendered.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiffs claim the penalty of a bond entered into by the defendants, with a condition to be void, if G. H. Hunter, one of the obligors, should have a certain negro (in relation to which the bond was made) or his value forthcoming, to answer any judgment which might be rendered in the district court, in a suit then pending, which had been brought by *Hunter's syndics* vs. *Hunter & Marshal*; wherein it was afterwards

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decreed, that the negro Tom, mentioned in the plaintiffs' petition, should be delivered over to said plaintiff.

This judgment was rendered on the 7th of November, 1821, and the evidence, in the present case, shews that a copy of it was served on both the defendants, on the 17th of the same month. It does not appear that the negro was demanded from Hunter, or any other step taken against him, except giving notice of the judgment.

On notifying said judgment to Bennet, he shewed complete willingness to have it complied with; and the delay which succeeded in delivering over the slave to the sheriff, in discharge of the condition of the bond, seems to have arisen more from the want of perseverance in that affair, than from any want of promptitude on the part of the defendants to comply with the obligation.

When we add to this that no demand of the slave was ever made on Hunter, who had him in possession, it does appear to us that there has not been such delay by the defendants, in performing the condition of their bond, as to cause them to have incurred its penalty.

There is something apparently anomalous

in the jury having found a verdict of non-suit: but as the judgment of the judge *a quo*, is in accordance with our ideas of the justice of the case,

It is therefore ordered, adjudged and decreed, that said judgment be affirmed with costs. *Post*, 5.

*Hoffman* for the plaintiffs, *Hennen* for the defendants.

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*MAYOR, &c.* vs. *HUNTER.*

If the son buy a lot for the father, who afterwards pays the annual rent, the consideration of the sale, and warrants the title of the son's vendee, these circumstances will not be conclusive evidence that the first sale was authorised or ratified, if it be shewn that the father ever refused to ratify it.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. This is a suit in which the plaintiffs claim from the defendant, an annual rent, as stipulated on the sale of certain lots, said to have been purchased by the latter from them, through the agency of his son, G. H. Hunter. The answer denies the authority of the pretended agent, and alleges that the purchase thus made, was never ratified and confirmed by the defendant, as principal.—Judgment was rendered against him in the court below, and he appealed.

There is something apparently contradicto-

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ry in the statement of facts. The parties admit that G. H. Hunter bought the lots for his father, and that the latter paid the rent for one or two years; but they state further that the father never did ratify the purchase thus made by his son. These lots were afterwards sold under the conditions, stipulated in the purchase from the corporation, by G. H. Hunter, to a third person; in which act of sale, G. Hunter, the father, appears to warrant the title of his son.

It is contended on the part of the plaintiffs, that this statement of the case shews a full acquiescence and tacit ratification of the purchase thus made for G. Hunter, sen., and that he is consequently bound to take the bargain with all its burthens, and should be decreed to pay the rent, as stipulated in the act of sale. The ratification and acknowlegement of acts done by one person for another, when the former has acted without previous authority, when they are not express, on mere legal presumptions, arising from the title, or some act of the principal, relating to the business transacted in his name; but not amounting to an express ratification.

In the present case, perhaps the conduct of

the defendant has been such as to authorise this legal presumption of ratification of the contract. But opposed to this is the fact admitted, that he always refused to ratify the purchase made by his son; which destroys the presumption arising from the payment of rent and assistance at the sale of the lots made to Paulding, for *stabit presumptio donec contrarium probetur, &c.* We are of opinion that the parish court erred in condemning the appellant to pay the debt demanded by the appellees.

It is therefore ordered, adjudged and decreed, that the judgment of said court be annulled, avoided and reversed, and that judgment be here entered for the defendant and appellant, with costs in both courts.

*Moreau* and *Hennen* for the plaintiffs, *Livermore* for the defendant.

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*HUNTER'S SYNDICS* vs. *HUNTER, ante* 1.

Former judgment confirmed.

MATHEWS, J. delivered the opinion of the court. Having doubted the correctness of our opinion, and the judgment heretofore rendered in this case, we granted a rehearing, at

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the request of the plaintiff, who is here appellant.

The sole question in the cause is, whether the bond, on which the action is founded, has been forfeited, so as to make the obligors liable for its penalty? The condition on which the obligation was to have been avoided, is to to have a certain negro (therein mentioned) or his value forthcoming, to answer any judgment that might be rendered in a case then pending in the district court, against one of the obligors, and another person. The decree of the court in that case was, that said negro should be delivered to the appellants, who were plaintiffs in the former case, as well as in this. They rely much for a change of our judgment, on the 35*th law of the* 11*th tit. Part.* 5; in which it is clearly laid down, that, where a man promises to give or to do any thing, under a certain penalty, and on a day fixed, the obligee has a right to claim either the penalty or the specific performance of the thing, at his option. When no day certain is fixed, the obligor, should it be required of him by the other party, at a proper time and place, and he refuse, when it was in his power to have fulfilled his promise: or if suf-

ficient time had elapsed for him to have performed it, had he so intended; from that time he will be bound to pay the penalty. It seems from this law, that a refusal to perform a promise, which has no time fixed for its fulfilment, when there is a demand to that effect, or an unreasonable delay in giving or doing the thing stipulated, will work a forfeiture of the penalty, under which such promise has been made.

The notice of the judgment was given to both the obligors on the same day, viz. 17th of November last. Bennet, from whom the fulfilment of the condition of the bond was demanded, did not refuse to comply; neither does it appear that Hunter refused. We have no doubt but that a tender or delivery of the negro to the sheriff, in discharge of the first judgment, if made in any reasonable time, and before suit actually commenced on the bond, would release the obligors. It does not appear that any request was made on Hunter to deliver the negro, or if it was, the time is not shewn. Bennet, on receiving notice of the judgment, and being required to cause a performance of the condition of his bond, offered at once to comply; but seems, on account of some cause not stated by the

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witness, James, to have desired a little further time, which was not objected to. Before the service of citation in this suit, the negro was placed in the possession of the sheriff, and in the course of about eight or nine days from the notice of judgment. Neither of the obligors refused to comply with their promise, when required so to do; nor does the delay, which intervened between notice of the judgment and the delivery of the negro to the sheriff, appear to us, with all the circumstances of the case, to have been unreasonable. The reason of the law, which subjects promisors to the payment of the penalty under which they bind themselves, is want of intention to fulfil their engagements, evinced either by express refusal or by lapse of time. Now, in this case, the person on whom the demand was made, so far from refusing, agreed immediately to do or cause to be done, that which had been promised. Upon the whole, we are of opinion that the former judgment of the court ought not to be disturbed.

*Hoffman* for the plaintiffs, *Hennen* for the defendant.

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Whether the holder of a note, secured by a special mortgage, having obtained judgment may levy it on any other property, than that specially mortgaged?

APPLICATION for a rehearing. 11 *Martin*, 555.

*Denis*, for the defendant. The court say that the counsel for the defendant relied on *Pothier on Mortgages*, when, in fact, *Pothier on Mortgages* was not even cited; but *Pothier on Obligations* was cited, but not exclusively relied on.

But the defendant relied principally on the *art.* 31, 458, of our *Civil Code*, which has been overlooked by the court, and which says:—"The special mortgage compels the creditor to come on and to cause to be sold the thing which is thus mortgaged to him, before he can come on the other property of his debtor; but that obligation is dispensed with, if it has been stipulated that the general mortgage should not derogate from the special, nor the special from the general."

In this case we see, by the act annexed to the record, that the mortgage is only a special one. What will become of the above article of our *code*, if the judgment, which this court has rendered, is confirmed? An execution must be issued in the ordinary way, and

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the law and the writ itself say, the moveable effects must be seized first.

Yet under the article of our *code*, above cited, I contracted that my land should be seized first.

It is said the plaintiff can control the execution on the *fi. fa.*; but the sheriff must be governed by the law, which imperatively commands him to seize the moveable effects first.

It is said if the plaintiff should have seized other things than the land, against the will of the defendant, he can obtain an injunction; but often times he cannot give security, and in fifteen days, contrary to his contract and contrary to the letter of our *Civil Code*, his moveable property is sold.

MARTIN, J. delivered the opinion of the court. The authority of *Pothier* must have the same weight, whatever may be the volume of his works, from which it is quoted.

It is true the *Civil Code* requires the special mortgagee to seize the property specially mortgaged, before he resorts to any other.

But when a creditor has its debt evidenced by a note of hand, and to the principal obligation resulting therefrom, adds the accessory

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one of a special mortgage, he may, if he see fit, have an order of seizure, which must be directed against the property specially mortgaged.

Yet nothing prevents his forbearing to resort to his mortgage, and institute his action upon the note. He may, says *Febrero* and the author of the *Curia Phillipica*, after having done so, abandon his suit, and put his mortgage in force, and *vice versa*.

Whether, after having had judgment on the note, he may or not levy it on any property of the defendant, or must first resort to that especially mortgaged, is a question which we will examine when complaint will be made that it was erroneously determined in another court. It does not appear to us that there is any necessity of granting a rehearing.

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*MACARTY* vs. *FOUCHER**.

APPEAL from the court of the parish and city of New-Orleans.

Digging a canal and felling trees are not such acts of possession, as may be the basis of the prescription of thirty years.

The plaintiff states that he is the owner, *by lawful title*, of a plantation which formerly be-

* This opinion was delivered in April last; but a rehearing had been granted, when the cases of that term went to press.

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longed to the late J. B. C. Lebreton, which extends so far as to include within its limits, a piece of land forty arpents in depth and ten arpents in width, beyond part of the defendant's plantation; that he is likewise owner of the said land by prescription, having occupied it by himself, or by those to whose title he has succeeded, upwards of thirty years, *animo clominii*; nevertheless, the defendant, pretending to be the true owner of the said tract, opposes him in the enjoyment thereof. He concludes that he may be maintained in the property and possession of said land, and the defendant forever enjoined from disturbing him therein.

The defendant pleaded the general issue, and the prescriptions of ten, twenty and thirty years.

There was judgment for the plaintiff, and the defendant appealed.

The facts shewn by the evidence are—that, before the year 1757, L. C. Lebreton was owner of a plantation of thirty-two arpents of front on the Mississippi, with the depth of forty, about seven miles above the city of New-Orleans. There existed thereon a saw mill

near the lower boundary of said tract, or the upper one of the next plantation, which was that of J. Belair, having eighteen arpents of front and eighty in depth.

On the 6th of September, 1757, L. C. Lebreton obtained a grant of the whole depth between a continuation of his side lines, as far as another plantation, which he owned between the cypress swamps of the river, and those of the lake.

L. C. Lebreton's plantation is now that of the plaintiff. J. Belair's is now owned, for the greatest part by the defendant, and the premises in dispute are part of it.

In 1767, J. Belair died, and his plantation was sold in two lots, one of ten arpents, immediately below Lebreton's plantation, and the other of eight arpents, both with a depth of eighty. A. & H. Belair bought the former and J. B. C. Lebreton, son of L. C. Lebreton, the latter.

On the 11th of January, 1768, J. B. C. Lebreton, by a double exchange with De la Freniere and A. & H. Belair, obtained the upper lot of J. Belair's plantation in lieu of the lower, which he had bought.

On the 10th of April, 1770, J. B. C. Lebre-

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ton and his wife sold one-half of this lot to Belair, viz : ten arpents in front on the river, immediately below L. C. Lebreton's plantation, with the depth of forty arpents.

J. B. C. Lebreton died in the following year, (1771) leaving a widow and several minor children, one of whom was B. F. Lebreton. L. C. Lebreton, the father of J. B. C. died on the 10th of June, 1776.

The property of the estate of J. B. C. Lebreton was adjudged to his widow at its valuation, and was not sufficient to cover her claims.

On the 21st of January, 1781, the plantation first mentioned was adjudged to B. Macarty, the plaintiff's grand-father, from whom it passed to the plaintiff by descent and purchase.

The sale was provoked by B. Macarty, stiling himself tutor and curator *ad bona* of the persons and estates of the minors Lebretron, sons of J. B. C. Lebreton, and the premises to be sold, are described as the plantation left by said Lebreton, and in the adjudication, as the plantation of F. L. Lebreton. (This is evidently a clerical error, F. L. Lebreton being mentioned as present at the sale.) The extent of the premises are not spoken of.

On the 13th of January, 1789, Villiers obtained from Gov. Miro, a grant of twenty-six arpents in depth, beyond the plantation which he had bought on the 10th of April, 1770, from J. B. C. Lebreton.

And on the next day sold to B. F. Lebreton a tract of seven arpents and three feet in front, with the depth of sixty-six arpents, bounded on the upper side by the plantation first mentioned, as the property of L. C. Lebreton and that of J. B. Macarty, the plaintiff"s father, son of B. Macarty.

On the 15th of January, 1800, B. F. Lebreton having died insolvent, the land, which he had bought from Villiers, was sold at auction, and purchased by the defendant: it is described as having seven arpents in front with the ordinary depth.

On the 11th of February, 1806, D. Clarke and J. Garrick, syndics of B. F. Lebreton's creditors, declared before a notary public, that there had been an error in the sale of the 15th of January, 1800, in mentioning that the land was sold with the ordinary depth, and that in truth it was sold with the depth mentioned in the sale made by Villiers to their insolvent, on the 14th of January, 1789.

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B. Macarty, the plaintiff's grand-father, does not appear to us to have purchased the land in dispute, which was part of the land which J. B. C. Lebreton acquired by a double exchange, with La Freniere and Belair, and which he retained, when he sold the same land with the depth of forty arpents only to Villiers, on the 10th of April, 1770.

The tract, which was adjudged to the plaintiff's grand-father, is described as a riparious estate, with several edifices, and a sawing mill thereon, evidently that which was left by L. C. Lebreton, a part of which descended to the children of J. B. C. Lebreton, one of his sons, as representatives of their father, who in his life time had occupied it as a tenant, and occasionally drawn timber for the mill from the land, below that of his father's, (that now in dispute) As the land that was then sold made part of the estate of L. C. Lebreton, of which the minor children of J. B. C. Lebreton had only the portion which they took, as representatives of their father, it cannot be imagined that another tract (although contiguous) but which had immediately descended to them from their father, and which belonged wholly to them, was ex-

pressly sold as part, or tacitly passed as an accessory of the plantation of L. C. Lebreton, their grand-father, which was the avowed subject of the sale.

Two tracts of land, part of different estates, and the property of different sets of heirs, cannot easily be believed to have been sold in a lump for one parcel, so as to render it impossible to ascertain what part of the whole was to be accounted for to each set of heirs.

Neither can it be conceived how any part of the land of J. B. C. Lebreton's estate, can be passed as an accessory, in thesaleof a tract of land part of the estate of L. C. Lebreton.

We conclude that the plaintiff has shewn no litteral title to the land in dispute.

A canal was dug, timber was felled, by the plaintiff's grandfather and father, and by himself; but acts like these, as we noticed in the case of *Prevost's heirs* vs. *Johnson et al.*, are not sufficient to establish a title by prescription; the digging of a canal is the work of a short time, and is not a continued act of ownership; the felling of trees is considered a mere trespass; the tracks of carts are only evidence of trespasses of this kind. In the present case, there is evidence of both plain-

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tiff and defendant, and their predecessors, occasionally resorting to the land in dispute for wood. We are bound to say, that the plaintiff cannot recover under the prescription, *longissimi temporis*, nor under that of 10 and 20 years; for he has no colour of title.

He has however shewn a possession by enclosure of a slip of land of ninety-two feet in width, in its lower part, towards the swamp, at the place G H, in the plan cited; the lowermost enclosure of which runs on the outside of the ditch, and reaches the lower line of the plaintiff's plantation, at the point F. Of the land, within this enclosure, he has evidently possession, and he appears to have had it upwards of one year before the inception of the present suit: he must be maintained in this legal possession against the defendant, unless the latter can shew a title.

He contends that Governor Miro granted to Villiers on the 13th of January, 1789, twenty-six arpents in depth, or about two-thirds of the disputed land towards the river; that Villiers sold it to B. F. Lebreton, with a depth of sixty-six arpents, and that thus, on the adjudication, the premises disposed of, were erroneously stated to be sold with the

ordinary depth, *i. e.* 40 arpents only. The syndics about six years afterwards gave him their declaration before a notary that this was done through a mistake, and the land was intended to be sold with the same depth, as in the sale from Villiers to their insolvent, *i. e.* 66 arpents.

The adjudication, in which an error is stated to have been committed, was made by a notary public, at the time acting as auctioneer, in consequence of a judicial decree, to which were parties, the widow of B. F. Lebreton, the curator of his children by a first wife, that of those of the second wife, and the syndics of his creditors. We cannot conceive how it can be urged that a sale made with such formalities, and in which so many different persons were interested, and were made parties, was validly altered (and made to convey what did not pass by it, before the alteration) by the syndics of the creditors. It is very clear that the defendant did not, by the adjudication nor the amendment, acquire any right to the 26 arpents in depth, below the forty that appear thereby to have been adjudged to him.

Being thus without a literal title, he cannot invoke any prescription, but that *longissimi temporis*.

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As to the 26 arpents beyond the land described in the adjudication, he has no vendor whose possession he might invoke. He does not appear to have ever been on the disputed land, before his purchase of that contiguous thereto in 1800.

His counsel, with the aid of that of the plaintiff, have strenuously strove to shew us that the titles, set up by the respective parties, are unsupported by literal or parol evidence.

The plaintiff, however, by the removal of his fences, has taken actual possession of a narrow strip, to which that possession and time have given him the lowest title that may be had in land, the naked possession. This *scintilla juris* enables him to prevail over the defendant, who has not even a shadow of right on this slip of land.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff be maintained in his possession of the triangular strip of land marked in the plan, by the letters F G and H; and that the defendant be ever enjoined from disturbing him therein, and that the petition be dismissed as to the remainder of the land. The costs to

be paid in the court below by the defendant, and in this by the plaintiff. *See July term.*

*Moreau* and *Mazureau* for the plaintiff, *Hennen, Livingston* and *Grymes* for the defendant.

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*HARROD & AL. vs. LAFARGE.*

APPEAL from the court of the first district.

A new trial cannot be granted, because it does not appear, "on what the jury based their virdict."

Conventional interest cannot be proven by parol.

An usage to charge interest at ten per cent. cannot be regarded.

Notes avowedly made to a merchant, for the sole purpose of obtaining his endorsement, & by this means his responsibility, are as strictly mercantile paper as a bill of exchange, which subjects parties thereto to mercantile law.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim $2978 40 cents, the balance of an account annexed to the petition.

The defendant pleaded the general issue, and that instead of his being indebted to them, as they allege, they owe him $2654 54 cents; for that they wrongfully shipped to Boston fifty-one hhds. of sugar, on which they occasioned him a loss to that amount.

The plaintiffs had a verdict for $1560, and the defendant prayed for a new trial, which was refused—there was judgment according to the verdict, and he appealed.

Michel deposed, that, in 1819, he had the superintendance of the defendant's plantation, and, in December, sent fifty hhds. of sugar therefrom to the plaintiffs; that there was a

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necessity of sending off so many hhds. on account of the want of room—moreover, the deponent was anxious of being, by this means, reimbursed of a sum of $1200, which he had, in the defendant's absence, advanced for the use of the plantation. The plaintiffs being unable to sell the sugar in New-Orleans, it being of an inferior quality, shipped it to Boston, in hopes of obtaining a better price.

The defendant returned on the last day of the year, and was in the city when the sugar was shipped, had knowlege of the shipment, and frequently expressed his satisfaction thereat, particularly at the time that he and the witness saw the sugar on the levee, about to be taken on board.

The witness received from the plaintiffs the above sum of $1200, and it is in his knowlege that they paid other sums to the defendant, part of the proceeds of the sugar.

The defendant's first note for $5000, given for the purchase of the plantation, and endorsed by the plaintiffs, was actually protested, when the sugar was sent to them.

The fifty hhds. were not weighed at the plantation, there being no scales there.

The rest of the crop was shipped to Phila-

delphia, by arrangement between the defendant and Morgan, Dorsey & Co.

The sugar sent to Boston, was shipped on the recommendation of the witness, who thought that port the best market.

The witness heard the defendant say he was to pay a commission to the plaintiffs for endorsing the notes he had given for the plantation. At the time of the defendant going to New-York, a part of the price, which was to be paid down, being unpaid, the defendant gave the witness a draft on New-York for it, *viz.* $1800, and said the plaintiffs would endorse it, if necessary; the witness finding it so, applied for and obtained their endorsement, and paid $18 therefor, which the defendant allowed him in his settlement.

On his cross-examination, the witness declared the plaintiffs required a letter from him, before they would ship the sugar. He firmly believes the sugar was not all shipped when the defendant returned from New-York, but he cannot positively swear it. He derives his information of the defendant being to pay the plaintiffs for their endorsement, from the following circumstance: On his being about to divide some of the notes given him by the

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defendant, for the plantation, into smaller notes, the latter asked whether the endorsement could not be dispensed with, as it would save some money. He did not understand that any claim would be made by the defendant for the endorsement of the plaintiffs on the draft of $1800, and never knew it till he saw the account presented by the defendant. He contests this item. The defendant told him his crop amounted to 200 hhds. sugar.

Wyer deposed, that the plaintiffs made an arrangement with his house for the shipment of 176 hhds. sugar to Boston, on the 29th of December, 1819. On the 31st, the first advance of $4000 was made, and on the 6th of January, the balance, $6998, was paid, being six cents per pound on the shipments. It was made to W. B. Swett & Co., by the Mary-Ann. The advance was paid in bills on Boston, at sixty days, negociated through the branch bank of the U. States, at a discount of three per cent. The house of W. B. Swett & Co. was at the time a respectable one, and did extensive business, and the witness had for several years before considerable dealings with it. The witness at the time thought the whole shipment belonged to the plaintiffs; but

was afterwards told by the defendant that some of his sugar had been shipped to a friend of the witness in Boston. He did not express any disapprobation of the shipment.

Hughes, a clerk of the plaintiffs, deposed that he left the defendant's account at Foucher's counting house—that the next day the defendant called and expressed some dissatisfaction at the charge of commissions for endorsement, observing that if it was struck out he would settle the amount. He made no objection to the account of sales of the sugar. There were 121 hhds. belonging to Holliday, and 51 to the defendant in the shipment made to Boston.

Clague says that he is established as a merchant in New-Orleans, since 1811, and he considers two and a half per cent a fair commission for endorsing notes; his house never takes less. He would make no difference as to notes secured by mortgage.

The following documents came up with the record:—

A letter of the defendant to the plaintiffs, in which he acknowleged that they had, at his request, negotiated his drafts on N. York, for $17,000, and had paid him the proceeds:

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also, that they had endorsed his notes for the payment of Mitchell's plantation for $108,500, and an assurance that, as a mark of his gratitude, the crop would be consigned to to them. Albin Mitchel's letters to the plaintiffs, advising the shipment of 51 hhds. of sugar, and the accounts of sales and the account current between the parties.

It does not appear to us that the judge *a quo* erred in refusing a new trial, on the ground that it cannot be known, "on what the jury based their verdict, nor what part of the plaintiffs' account has been allowed and what part rejected." We think with the plaintiffs' counsel, that it is neither necessary or usual to designate in the verdict, the particular items of an account, which the jury think supported by the evidence; it suffices that they ascertain the sum due.

We think, with the defendant's counsel, that a charge of interest at the rate of ten per cent. can only be allowed while supported by written proof. *Civ. Code*, 408, *art.* 32. The alleged usage of the merchants of paying and demanding interest at that rate, cannot be regarded; for it is contrary to an express law.—*Id.* This principle was recognised by this court in *Duplantier* vs. *St. Pe*, 3 *Martin*, 127.

The jury might well on the testimony before them, allow the commission claimed for endorsing the defendant's paper. They had evidence under his hand, that they had endorsed to a very considerable amount—evidence of the usual rate of such a commission—evidence of the defendant intending to pay such a commission, and if the sole testimony of the witness deposing to this purpose is insufficient, it was corroborated by a beginning of proof in writing—his letters stating the amount of his notes endorsed by the plaintiffs.

We are of opinion that notes, avowedly made to a merchant, for the sole purpose of obtaining his endorsment and by this means his responsibility, are as strictly mercantile paper as a bill of exchange, which subjects parties thereto to mercantile law, and that in this instance proof by a single witness was admissible.

We are of opinion, that there is no evidence of a legal engagement to consign the defendant's crop to the plaintiffs; the letter appears to us to convey nothing more than a declaration of the writer's intention—that there is no consideration to support a contract; the endorsement of the paper was a past

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transaction, which had the determinate compensation which the plaintiff seeks in the present suit. The consignment is expressly mentioned as a mark of gratitude; and gratitude is essentially voluntary.

Upon the whole, we are of opinion that the question was fairly before the jury, and the case supported by evidence of which they are the best judges. They have reduced the plaintiffs' demand to one half; a reduction considerably exceeding the commission charged on the crops. We cannot say that they erred—nor that the case was such a one in which it was the duty of the court to interfere by granting a new trial.

It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs.

*Morse* for the plaintiffs, *Denis* for the defendant.

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*BLOSSMAN* vs. *HIS CREDITORS.*

An appeal from an order, refusing to permit the plaintiff to make a voluntary surrender,

APPEAL from the court of the parish and city of New-Orleas.

PORTER, J. delivered the opinion of the

court. The appeal is taken in this case from an order of the parish court, refusing to permit the plaintiff to make a voluntary surrender of his property. The reason assigned by the judge for his decision, was that a forced surrender had already been obtained by the defendants against the plaintiff. The correctness of this opinion depends on the length to which these proceedings had been carried before this application was made, as they may have gone so far as to render it impossible for the debtor to comply with the act, of which he claims the benefit.

will be dismissed, if the record shew that his creditors had obtained an order for a forced surrender, without shewing how far they had proceeded therein.

What is related in the opinion of the judge *a quo* cannot be received as evidence on the appeal.

Nothing in the record enables us to ascertain this fact so indispensable to a correct understanding of the case. The motion made by counsel is to set aside the order and proceedings had in the case of *Bickle & Hamblett* vs. *Blossman* for a forced surrender, without stating at what stage they had arrived; what is related in the opinion of the judge, it has already been decided, cannot be noticed as evidence of the facts. 3 *Martin*, 221. 11, *ibid.* 453. Were we to receive it as such, a strong case would be made against the plaintiff; for the judge does not state that procedings on the part of the creditors had been com-

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menced against him; but that a forced surrender had been obtained.

It is therefore ordered, adjudged and decreed that the appeal be dismissed with costs.

*Carleton* for the plaintiff, *Morse* for the defendants.

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*EVANS* vs. *RICHARDSON.*

The verdict of a jury cannot be disregarded, on an appeal, where it does not appear evidently erroneous.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. This is a suit brought to recover half the amount of profits on sales, of a certain quantity of cotton, which the plaintiff alleges in his petition, was shipped from New-Orleans to Liverpool on the joint account and risque of himself and the defendant, and there sold by the latter for their common benefit. The answer contains peremptory exceptions and the general issue. The cause was submitted to a special jury in the court below, who returned a verdict for the defendant; and judgment having been rendered thereon, the plaintiff appealed.

It appears, from the record of the case, that

the principal fact on which the plaintiff rests his claim, *viz.* the existence of the contract by which he attempts to support a joint interest with the defendant, in the cotton which was shipped and sold, as alleged in the petition, is negatived by the verdict of the jury. If the verdict be not contrary to evidence, it ought not to be disturbed. We have examined the testimony and do not believe the finding of the jury to be contrary thereto. Being satisfied with the decision of the cause on its merits, it is unnecessary to enquire into the exceptions to the action.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

*Duncan* for the plaintiff, *Eustis* for the defendant.

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*HARPER* vs. *DESTREHAN.*

When the plaintiff does not make out his title, he ought to be non-suited.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiff, in his own right, that of his wife, and as guardian to certain minor children, residing in the state of Mississippi,

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claims a slave in possession of the defendant. The answer is a general denial. The evidence does not establish title to the property, and the petitioner cannot recover.

The judge *a quo* gave final judgment in favour of the defendant. We think this a case in which there should be one of non-suit. 7 *Martin*, 562, 566. 9 *ibid* 268, 533.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that there be judgment for the defendant as in case of a non-suit, and that he pay the costs in the court of the first instance, and the plaintiff those of appeal.

*Christy* for the plaintiff, *Grymes* for the defendant.

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*HANNA* vs. *HIS CREDITORS.*

The landlord has a privilege on the goods in the store, and furniture in the house, for his rent.

But he must urge it within a fortnight after the removal.

A judgment

APPEAL from the court of the parish and city of New-Orleans.

*Seghers*, for the syndics. Ten creditors have opposed the homologation of the tableau.

1. Samuel Packwood is on the tableau for the amount of his claim; but he contends that

he is entitled to a privilege, as his claim is for the rent of the house in Bienville street, occupied by Hanna up to his failure. The question of privilege is submitted to the court.

2. Madame Papet is also on the tableau and claims likewise a privilege—the debt proceeding from house rent; but it is in evidence that Hanna left her house, in Custom-house street, fourteen months previous to his failure; the syndics therefore maintain that this opposition ought to be dismissed.

3. The tutrix of the heirs of Peter V. Ogden, claims $630, for store rent. It is in evidence that Hanna rented his store from P. V. Ogden, but there is no evidence as to what was due at his failure; M. Morgan deposing only what he heard from P. V. Ogden. The syndics however admit from the books of Hanna, that seven months were due; but at the same time they set forth from the same books a set-off of $253 48, for sundries furnished by Hanna to P. V. Ogden during that period; which leaves a balance in favor of the heirs of P. V. Ogden of $236 52; for which sum they have no objection to his being placed on the tableau as a privileged creditor; but they oppose any further claim of his.

not registered gives no privilege.

An attaching creditor loses his lien, in case of insolvency.

A plaintiff acquires no lien, by taking out a *fi fa* and countermanding its execution.

Nor by taking it out and forbearing to take an *alias*, on its return.

A decree that a garnishee pay the plaintiff the funds of the defendant, is tantamount to a judgment.

A garnishee's admission of property in his hands, in his answers to interrogatories, is not a voluntary confession of judgment.

A judgment gives a lien, not on its being docketed, but on its being registered with the recorder of mortgages.

The certificate of the recorder of mort-

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gages, is legal evidence.

A creditor may pursue his remedy, till a stay of proceedings arrests him.

4. B. Levy and Chs. Thomas, syndics, &c. claim $68 67½ as ordinary creditors, and $22 25 costs, as a privileged debt, by virtue of a judgment of the city court of appeals. The syndics contend, 1st, that the oponents ought to declare of what estate they are the syndics; and 2dly, that a detailed statement of the taxed costs must be produced. With these observations the matter is submitted to the court.

5. Kirk & Mercien claim $152 08, as ordinary creditors. The syndics do not contest the claim, as it appears to them a just debt, and they have no objection that it should be admitted.

6. James Ronaldson claims a privilege for the amount of the debt and costs. The debt is placed on the tableau as an ordinary one; the costs paid to the sheriff by the syndics. Therefore, the only question to be decided on this opposition, is whether the opponent is entitled to a privilege. He grounds this claim on his attachment, which was issued August 17th, 1820, the day previous to the stay of proceedings. The counsel for the syndics thinks it hardly necessary to refute the claim. At all events, he refers the court to 2 *Martin*,

89, and entertains no doubt but that this opposition will be dismissed.

7. Gilbert E. Russell & Co. are placed on the tableau as ordinary creditors. They claim a privilege grounded on a judgment, which they obtained against Hanna in the district court, and on a writ of *fi. fa.* issued thereon. By the record of their suit, it appears that the judgment was rendered December 1st, 1819, but that no execution ever issued, and that no other step was taken thereon. The syndics contend that Hanna was in failing circumstances previous to the date of said judgment, and moreover, that the mere judgment creates no lien on the property, and consequently no privilege. The syndics therefore maintain that this opposition must be dismissed, reserving to explain hereafter, what is to be understood by failing circumstances.

8. Lefort is likewise placed on the tableau as an ordinary creditor. He claims a privilege grounded, both on a judgment which he obtained in the district court and on a writ of *fi. fa.* issued thereon.

The syndics deny the privilege, on the ground that Hanna was already in failing cir-

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cumstances at the time of, and previous to the date of the judgment, and that therefore, neither the judgment nor the writ of *fi. fa.* could work a lien on the insolvent's property to the prejudice of his other creditors. They contend, that had even the *fi. fa.* ever worked a lien, this lien was dissolved by the plaintiff's staying the execution and stopping there the proceedings. From the record, which is introduced in evidence, it appears that judgment was rendered April 17th, 1820; that a *fi. fa.* was issued the same day; that the execution was stayed by the plaintiff in the hands of the sheriff, who returned the writ April 7th, 1821, and that no other or further step was since taken in the cause.

The syndics, therefore, maintain that this opposition must likewise be dismissed. They rely on the following authorities: *Curia Phillipica, lib.* 2; *Comercio terrestre, cap.* 11; *Fallidos, p.* 406.

"No. 1. Insolvent are those merchants, brokers and bankers, or their agents, who fail or break at the time of their payment, credits or obligations and contracts."

"No. 2. Hence it follows that those are insolvent, who flee, or conceal their persons

by retiring into churches or other places, although they do not take away nor conceal any of their goods or books."

"No. 3. Hence it follows, likewise, that those are insolvent who break or fail in their credits or obligations, for want of property, though they neither take away nor conceal their property or persons; as also those who cannot entirely pay all their debts, and those who for their debts, are executed in their property by their creditors."

The No. 2 is explained by the 22d section of the *insolvent act* of 1817, *page* 136, which after having stated what persons shall be considered as fraudulent bankrupts, says:—"The same rule shall apply to any insolvent debtor, who shall abscond or absent himself from his usual place of residence, without leaving to his creditors any account of his affairs, and without having previously surrendered to them his property."

*Nouveau Denisart, tom* 8. *pages* 402 *et* 403, *verbo Faillite*:—No. 4. *Quoique le défaut de payement de quelques dettes, particulières ne soit pas un signe absolument certain de faillite, néanmoins, lorsqu'il est suivi du non payement des autres, dettes de*

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*la rupture du commerce, de la discontinuation de l'etat de banquier, ou autres circonstances, qui constatent la faillite, alors la faillite est ouverte du jour que le failli a commencé de cesser ses payemens. C'est d'apres ce principe que les consuls de Paris consultés en vertu d' un arret de la cour du* 20 *Janvier*, 1755, *sur l'époque à laquelle il fallait fixer l'époque de la faillite du sieur Lay de Serisy, ont donné leur avis, le* 25 *Mars suivant, assistés de plusieurs banquiers et négocians, en ces termes. Estimons tous unanimement, qu' attendu la notoriété de la cessation du dit Lay de Serisy, des le* 11 *Juin*, 1745, *et tout ce qui s'en est ensuivi, sans qu'il paraisse les avoir repris, la faillite du Sieur Lay de Serisy doit étré réputée et déclarée ouverte des le dit jour* 11 *Juin*, 1745, *date de la première de nos sentences obtenues ontre lui, et qui a été suivie de nombre d'autres sans interruption.*"

From these authorities it may be inferred what is understood by failing circumstances. I think it is a collection of uninterrupted circumstances preceding the failure, such as do leave no doubt, but that it must ensue; and by the effect of which, the date of the failure is traced back to the beginning of these circumstances, or to the first obligation the insolvent failed to discharge; or in other words,

to the first protest or to the first judgment, which he suffered to go against him.

The evidence on file in this case brings it within each of the provisions of these authorities.

1. For ten or twelve months previous to his failure, Hanna was greatly embarrassed and his notes were frequently protested.

2. From the month of January, 1819, up to his failure, that is, to the stay of proceedings, eighteen law-suits were brought against him by his creditors, all for money due, exclusive of two more, *viz:* that of *John Day* vs. *Eastburne & Co.* in which he was sued as garnishee for money due by him to the defendants; and that of *Pierre Romain and others* for the forced surrender, on which the stay of proceedings was granted, on the 18th of August, 1820.

3. In thirteen of those suits judgment was rendered against Hanna; the first on the 7th of April, 1819, and so on successively to the 20th June, 1820; in the other suits, writs of attachment and sequestration were issued nearly all in August, 1820.

4. On six of the above judgments, execution issued, the first in August, 1819, and an

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alias *fi. fa.* in November following; the other executions issued all successively in the months of April, May, June and August, 1820.

5. Under these circumstances Hanna absented himself from this state, on the 23d of July, 1820, without leaving to his creditors any account of his affairs, and without having previously surrendered to them his property.

These united signs of an impending failure followed by an actual one, evidently shew that Hanna was in failing circumstances long before the stay of proceedings, and that therefore the date of his failure is to be traced back to a time previous to the judgment of Lefort; if we take for our guide the first judgment, it will carry us back to the 7th of April, 1819; if the first execution, to August or November, of the same year; if the first protest, this took place at least, in or about the month of October of the same year.

It follows that the judgment obtained by Lefort on the 17th of April, 1820, was rendered, when, legally speaking, Hanna was in open failure, and is therefore void as to the other creditors, according to the provisions of the 17th section of the act of March 25, 1808. 2 *Martin's Digest*, 454, and the 24th section of the act of 1817, page 136.

9. Moses Duffy is put on the tableau [illegible] ordinary creditor, for the full amount [illegible] claim, it being the same identical one, as that of F. J. Sullivan of Philadelphia, whose agent he is; he maintains he is entitled to be paid by privilege, on the ground that he obtained three several judgments against the insolvent in the district court; the two first on the 7th, and the latter on the 20th of June, 1820, and sued out executions thereon on those respective days.

The syndics resist the privilege for the following reasons:—1st, That Hanna was already in failing circumstances, when those three judgments were rendered, and even before; 2dly, That supposing that the date of the failure could only be reckoned from the 23d of July, 1820, the day of his departure, or even from the 18th of August following, when the proceedings were stayed; yet the dates of these three judgments fall within the three months immediately preceding either of those two epochs, and come therefore within the provisions of the acts of 1808 and 1817, just quoted. According to these provisions the judgments, and of course the executions issued thereon, are void and can bestow no

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privilege to the prejudice of the mass of the creditors.

It may be contended, that neither of those two acts apply to the case, as the one provides for debtors in actual custody, and the other for voluntary surrenders. To this I reply—1st, that this case, which was a forced surrender, has since become a voluntary one, having been consolidated with the latter, which was brought afterwards by Hanna himself; 2dly, that those provisions indiscriminately apply to any case of insolvency; this section of the act of 1808, having been taken by the supreme court as the basis of their dedision in the case of *Roussel* vs. the syndics of *Dukeylus*, 4, *Martin*, 212, though *Dukeylus*' failure was a case of voluntary surrender, and the act of 1817 was not yet enacted. In this case a mortgage was avoided, because it was made within three months of the failure. No difference is made in either of the acts between alienations of property, mortgages or judgments, which are all declared void, if they have taken place within the three months previous to the failure.

As to the other position I have taken, that Hanna was in failing circumstances previous

to the dates of those judgments, and that therefore the date of his failure is, legally speaking, anterior to the judgments themselves, I refer the court to what I have said on this subject and to the authorities quoted in support thereof, in the foregoing part of the argument, relating to Lefort.

10. John Day is placed on the tableau for the full amount of his claim, as an ordinary creditor. But he pretends that he is entitled to a privilege for the said amount, as well on the immoveables and slaves as on the moveables surrendered by the insolvent. This pretention he rests on the following grounds:

1. That he obtained a judgment against Hanna in the first district court, for the sum of $2836 55.

2. That the said judgment was duly docketted, and afterwards, *to wit:* on the 7th of June, 1820, duly recorded at the office of the recorder of mortgages in the parish of Orleans, and that in consequence of this docketting and recording, all the real property and slaves belonging to Hanna, within this state, were and are bound, and liable for the debt for which the said judgment was obtained.

3. That afterwards, *to wit:* on the 8th day

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of August, 1820, he caused a writ of alias *fieri facias* to be issued on the said judgment, which writ was delivered to the sheriff on the same day, 8th of August; and that thereby all the personal property of Hanna was from that time bound and liable for the satisfaction of that judgment, into whose hands soever the property might come.

The syndics resist the privilege, and the better to establish their defence, they have introduced the transcript of the record of the cause in which the pretended judgment was obtained. They ground their defence on the following points:—

1. There is no judgment against Hanna.

2. If there be judgment against him, it is void.

3. The docketting the judgment creates no lien on the real property and slaves of the debtor.

4. There is no evidence that the judgment was recorded with the register of mortgages, and should it appear that it was recorded, it does not, nor ever did affect Hanna's real property or slaves.

5. The writ of alias *fieri facias* issued and delivered to the sheriff on the 8th of August,

1820, neither did nor could create a lien on the personal property of Hanna, to the prejudice of the mass of his creditors.

1st point, There is no judgment against Hanna.

From the record on file, it appears that this suit was instituted against James Eastburne & Co., and that Hanna was made garnishee; that judgment was rendered against the defendants, and that the garnishee was thereby ordered to pay over to the plaintiff the amount acknowleged to have been attached in his hands, in part satisfaction of this judgment.

The words of this judgment are plain; it goes against the defendants in favor of the plaintiff and goes no further. This court is certainly not prepared to construe it into a judgment against Hanna; nor is there any provision in our laws, under which such judgment could have been rendered. The act of March 20th, 1811, 1 *Martin's Digest*, 518 to 522, is the only one which provides for garnishees, and the 3d section of it points out the sole instance in which judgment may be rendered against them. Now, the case of Hanna did not come within the provisions of this section; for the record shews that he had

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neither neglected nor refused to answer the interrogatories, propounded to him by the plaintiff. Nor can the latter shelter himself under the 5th section to maintain that his judgment goes against Hanna; this section allows in no case judgment against the garnishee personally, but merely provides that after judgment has been obtained against the defendant, the goods, chattels, &c. which shall be made to appear in the possession of the garnishee, shall be adjudged accordingly, and shall be subject to execution. What else then is thereby provided, but that if there be judgment against the defendant, his goods, chattels, &c. in the hands of the garnishee, shall be adjudged and held subject to the execution on said judgment.

This is far from authorising a judgment against the garnishee personally; nor did the district court fall into the error of rendering any against Hanna in this instance; it is merely an order directed to him, as it would be to the sheriff, or any other depositary, to pay over to the plaintiff the amount attached in his hands, in part satisfaction of the judgment against the defendant. No sum is specified against Hanna, which would have been

indispensable in a judgment. I therefore maintain that there is none against him, nor was there any occasion for one; for as I shall soon observe no part of the sum attached in his hands, was yet due at the time the judgment was rendered.

2d point. If there be judgment against Hanna, it is void.

1st. At the time it was rendered, Hanna was already in failing circumstances; he was greatly embarrassed in his affairs, and had, since two months and upwards, his notes frequently protested; three judgments had already been rendered against him; three others followed immediately, and six more at short intervals, whilst the protests were continuing, and the embarrassment increasing till they ended in the actual failure. These facts appear from the evidence in the cause; for the inference therefrom to be drawn, the syndics rely on the following authorities: *Curia Phillipica, lib.* 2, *Comercio terrestre, cap.* 11, *Fallidos, p,* 406. *No.* 1, *No.* 2 *and No.* 3. *Nouveau Dénisart, tom.* 8, *pages* 403 *et* 402 *verbo Faillite.*

The No. 2, *Fallidos, Curia Phillipica,* is explained by the 22d section of the insolvent

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act of 1817, page 136. From these authorities, it may be inferred, what is understood by failing circumstances. I think it is a collection of uninterrupted circumstances preceding the failure, such as to leave no doubt but that it must ensue; and by the effect of which, the date of the failure is traced back to the beginning of these circumstances, or to the first obligation the insolvent failed to discharge; or in other words, to the first protest, or to the first judgment which he suffered to go against him.

The evidence on file, in this case, brings it within each of the provisions of these authorities. It is true that Hanna had not yet, previous to the judgment, left the state of Louisiana, but it is in evidence by the depositions of two or more of the witnesses, that for two months and more previous to the 14th of December, 1819, he was daily protested.

2dly. Under these circumstances, Hanna confessed this judgment before the maturity of the debt. He owed nothing to Day, the plaintiff; James Eastburne & Co., the defendants, were his creditors. By the attachment Day became subrogated to their rights against Hanna; but this could not place him on a better footing than they were themselves

We find that the sum, which he acknowleges to owe Eastburne, was payable in several instalments, whereof the first would be due on or about the first of March, 1820, when sixty days more were to be allowed for its payment; so that in fact it became due but on or about the first of May, and so on with the other instalments successively, up to the 27th of September, 1820, including always the sixty days.

On this confession of Hanna, has the judgment been rendered on the 24th of December, 1819. This fact, though denied by John Day, does no less appear on the face of the record of his suit, which is on file in this cause. Could it avail Day, and consequently James Eastburne & Co. to the prejudice of the mass of Hanna's creditors, this would amount to nothing less than indirectly granting the latter a privilege, which they would have been denied, had they sued Hanna in their own name; for I see no difference in the contemplation of the failure between a confession of judgment made by the debtor before the debt falls due, with the view to give one creditor an undue preference over the others, and the discharge of a debt nor yet payable.

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when the debtor has not wherewith to pay demands which falls daily due. The law reprobates and avoids both; for the former position, I refer the court to the two insolvent statutes of March 25, 1808, 2 *Martin's Digest* 454, and of 1817, 24th section, page 136. For the latter position to the opinion of the supreme court in the case of *Roussel* vs. the syndics of *Dukeylus*, 4 *Martin*, 240 and 241.

It may be contended that neither of those two insolvent statutes apply to the case, as the one provides for debtors in actual custody, and the other for voluntary surrenders. To this I reply—first, that this case, which was a forced surrender, has since become a voluntary one; having been consolidated with the latter, which was brought afterwards by Hanna himself; secondly, that those provisions indiscriminately apply to any case of insolvency. No difference is made in either of the acts between alienations of property, mortgages or judgments, which are all declared void, if they have taken place within the three months previous to the failure.

3d point. The docketting the judgment creates no lien on the real property and slaves of the debtor.

It is true that by the 13th section of the statute of 1805, 2 *Martin's Digest*, 164, it is provided that the docketting of a judgment shall bind the real property and slaves of the person against whom such judgment has been rendered; but I contend that this provision has been repealed by the *Civil Code*, which enacts, *page* 454 *art.* 14, that judicial mortgages cannot operate against a third person, except from the day of their being recorded in the office of the register of mortgages; and by the 7th section of the act of March 26th, 1813, 1 *Martin's Digest*, 702.

But it has been erroneously asserted that the syndics do but represent Hanna himself, and that his property cannot be considered as having passed into the hands of third purchasers.

The contrary doctrine, on which we rely, is grounded on the well known principle that the cession or surrender does not transfer the property of the insolvent's estate to his creditors, but that their syndics take possession thereof in the same manner as does the sheriff, when he seizes the defendant's property on a writ of execution, and that therefore, the creditors, by their syndics, preserve all their

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exceptions against any claim of privilege by mortgage or otherwise, just as would a third purchaser. This doctrine is explained in the first volume of the *Nouveau Denisart*, *verbo Abandonnement*.

4th point. There is no evidence that the judgment was recorded with the register of mortgages; and should it appear that it was recorded, it does not, nor ever did affect Hanna's real property or slaves.

The only evidence that has been introduced of the recording of the judgment with the register of mortgages, is a certificate of the said register, delivered on the 23d of November, 1821, and which has been filed by the opponent on the 22d of December following. From the inspection of this document, the court will perceive that it must be disregarded and can by no means be admitted as evidence in the cause. It is a general rule that a copy authenticated by a person appointed for that purpose is good evidence of the contents of the original. But where the officer is not intrusted to make out a copy, and has no more authority than any common person, the copy must be proved in the strict and regular mode. *Phillips' Evidence*, 292. This rule applies to

the recorder of mortgages, as to any other public officer; when he certifies the contents of his own records, his certificate may be good evidence; but not so when he certifies that which must appear from other records than his. Now, here he certifies that in a certain cause, depending in the district court, judgment has been rendered. It will certainly not be contended that the register of mortgages is the proper officer entrusted to certify the judgments of that court. On this point, he has no more authority than any common person, and his certificate therefore, as far as this, must be disregarded. Were his evidence admissible on this point, it should be given on oath; I maintain however that it is altogether inadmissible, as the judgments of a court of justice can only be certified by its clerk and under its seal.

The recorder, after having thus certified that such a judgment has been rendered, and after having further certified its contents, goes on and equally certifies that the above judgment has been registered. Now, if the first part of the certificate be void, it must be considered as being neither written nor introduced; and hence it follows that the latter part

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certifies nothing as it relates to a judgment, which is not mentioned. Besides, I maintain that no certificate of this kind can be admitted to prove the recording of a judgment. A copy duly authenticated or certified by the register of mortgages under his hand and seal must be produced, of that part of his records, which contains the said registering. This he is authorised to certify but nothing else; his authority goes no farther.

I conclude that there is no evidence of the recording of any judgment against Hanna.

Should the court however be of opinion that the judgment was recorded on the 7th of June 1820, as it is contended by the opponent, I would then further maintain that this recording could not affect the real property or slaves of Hanna, but only those of the defendants, and this for the following reasons:

1. This judgment is not rendered against Hanna, as it has already been observed, but against the defendants.

2. This registering, if it could affect Hanna's property, was void from the beginning because it created a mortgage on the insolvent's property within the three months of failure.

5th point. The writ of *alias fi. fa.* issued and delivered to the sheriff on the 8th of August, 1820, neither did nor could create a lien on the personal property of Hanna, to the prejudice of the mass of his creditors.

The first writ of execution, or *fi fa.*, was issued in May, 1820, but on this the opponent does not rely; he is aware that it could not avail him. Scarcely were two of the instalments due, when the writ issued, the balance was not yet payable; and, notwithstanding, the whole was included in the execution; this, however, was stayed by the plaintiff, in the hands of the sheriff, as it appears from his return on record, and could therefore create no lien, nor does the opponent claim any under this first writ. But he asserts that by delivering, on the 8th of August, 1820, the second writ of *alias fi. fa.*, to the sheriff, all the personal property of Hanna became bound and liable for the satisfaction of this writ; and that by the seizure made afterwards by the sheriff, by virtue of said writ, of Hanna's said personal property, he the opponent obtained a lien and privilege on the same for the amount due on his judgment.

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This lien, this privilege the syndics resist, relying on the following grounds:—

1. The judgment, as it stands, is against the defendants, not against Hanna, and consequently no writ could issue against his personal property.

2. Admitting, for the sake of argument, that the judgment goes against Hanna, and that the execution thereon was rightfully issued on the 8th of August, 1820; yet the syndics maintain that the statute of 1805, providing that the delivery of such a writ to the sheriff, shall bind the personal property of the person against whom it is directed, and the Spanish law assuring to the seizing creditor a privilege on the property seized in execution, are both limited by the insolvent laws. They do by no means extend to cases of insolvency, which are governed by far different rules. *Roussel* vs. *Dukeylus' syndics*, 4 *Martin*, 238.

Besides a simple reference to the dates will make it appear how groundless are the pretentions of the opponent. He tells us that the writ was issued on the 8th of August, and that the seizure took place afterwards. Now, it is in evidence, that Hanna left the state on

the 23d of July, and that the stay of proceedings was issued on the 18th of August. I have shewn, by positive law, that this departure of Hanna opened the failure, and that it is at least to this epoch that it must be traced. Therefore, in such a state of things, no lien, no privilege, could accrue to the prejudice of Hanna's creditors.

Were it possible that grounds so strong should be overlooked, one still stronger remains. Bloomfield, one of the witnesses, deposes, that Hanna's embarrassments were daily increasing; that for some weeks previous to the failure, he was kept up by the opponent, on paying one hundred dollars a week; that the deponent, who was Hanna's agent, since his departure, finding it impracticable to make up this weekly sum, requested the agents of the opponent to take possession of the store, which they did by sending the sheriff, who made the seizure. Hence, is it not clear that the writ was issued, and that the seizure took place at the instigation of the debtor, who being about to fail (were even any other epoch of the failure than the stay of proceedings disregarded) did openly collude

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with one of his creditors to give him an undue preference over the others?

*Workman*, for Day, one of the opposing creditors and appellant. The appellant obtained judgment against Eastburne, and against B. Hanna, as a garnishee in that suit, in the first district court.

That judgment was docketted on the 14th December, 1819.

It was registered at the mortgage office, 7th June 1820.

A writ of *fi. fa.* issued thereupon, 22d May, 1820.

A stay of execution having been granted to Hanna, an alias writ of *fi. fa.* was issued 8th August, 1820.

By virtue of this last writ, the sheriff seized and took possession of the goods of Hanna, on the day it issued. And on the 18th of the same month and year, while the sheriff was in possession of those goods, a petition, for a forced surrender, was presented by some of Hanna's creditors, and an order for a general meeting of the creditors, and a stay of proceedings was obtained.

From these facts, I contend that the judgment obtained against B. Hanna as garnishee,

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gives to the plaintiff and appellant a lien on all Hanna's real property and slaves, from the date of the docketting of that judgment, *viz* : the 14th December, 1819. This property is now subject to the same claims and privileges as if it had remained in the possession of Hanna. It did not cease to be Hanna's till it was sold by his syndics. They held it merely as his representatives. They cannot be considered as third parties. If they were so considered, they would not be bound by this judgment against Hanna, nor by any other judgment that could have been obtained against him. They might deny the debt, and drive the plaintiff to a new suit;—a consequence absurd in itself, and contrary to all the known provisions, and invariable practice of our insolvent laws.

Even in the hands of third possessors, this judgment would bind Hanna's real property, from the date of the registry. The counsel's remarks on the certificate of the register of mortgages, are refuted by an inspection of that document itself. It proves the registry indisputably. 1 *Martin's Digest*, 164.

It is also clear that the moveable property of Hanna was bound by the writ of *fi. fa.* at

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least from the 8th August, 1820 (the date of the second writ of execution) if not from the 22 of May preceding. 2 *Martin's Digest*, 168 and 9 *Martin*, 585.

In opposition to this claim, it is said, first, that there is no judgment against B. Hanna. The record of the original suit against Eastburne shews that the judgment, or order of the court is as precise, positive, and formal against Hanna, for the amount which he declared he owed to the defendant, as against that defendant himself, for the whole amount of the debt. It is difficult to conceive how any judgment could be given against a garnishee, in a more regular and legal manner than that rendered in this case against Hanna.

2. It is further said that no execution can be issued against the garnishee's property.— Then the whole proceedings of attachment would be a mere mockery of justice. If you can not make the garnishee pay what he acknowleges he owes to your debtor, it is quite idle to attach that debt in his hands. But our law is not so vain and nugatory. The legislature has provided by the 3d and 8th sections of the act of 1811, 1 *Mart. Dig.* 520, 522, that execution shall issue against

the garnishee. The Spanish law had the same provision. Execution might be had against moveable property, against immoveable property, and against *debts*, rights or actions. *Part.* 2, 27, 3. And when the execution was directed against the debts due to the defendant, the debtors were cited, as if the execution was against *them*; and proceedings might be taken against those debtors to compel them to pay what they owed to the defendant, if the defendant himself did not pay. *Febrero, p.* 2. *c.* 2. *no.* 170.

As our law now stands, no other mode of judicial compulsion could be adopted in our case but that by the writ of *fi. fa.* of which we have availed ourselves. The writ of *distringas*, which it is pretended would have been the proper one, is applicable only to compel the performance of any specific act, other than the payment of money. 2 *Mart. Dig.* 174. In the attachment laws which our assembly probably had in view, when our attachment statutes were passed, the writ of *fi. fa.* against the garnishee is allowed. *Sergeant's At. Laws*, 206.

3. It is also objected that this judgment has been obtained by collusion with Hanna, to the injury of his other creditors. The very reverse is abundantly proved. It appears from the

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record, that the garnishee Hanna took time to amend his answer to the interrogatories, and that in his amended answer he extends the periods for the payment of the sums due by him to the defendant. It will also be seen that the first writ of execution against him was stayed for some months, to give him time to make gradual payments, to continue his business and satisfy all his creditors. The whole of this business was manifestly transacted with good faith, lenity and indulgence on the part of the plaintiff—and with fair and honest intentions on the part of the garnishee.

4. The judgment, it is further urged, was obtained against Hanna, when he was in failing circumstances—*proximo á quebra*—about to fail. The evidence to shew that he was in such circumstances is extremely vague and unsatisfactory. It amounts to no more than this, that he frequently neglected or refused to pay his debts. The same thing might be proved every day against some of our opulent citizens—men who hold large and valuable property, ten times more than sufficient to pay all their debts, but who seldom or never do pay any of them, till compelled by judicial process. Far be it from me to cast any reproach

upon these worthy persons. Perhaps they deem it safest to have the payment of their debts made matter of record: or may be they are moved by the laudable desire of maintaining our useful profession in profitable practice—of keeping the learned judges in full study and occupation, and making their fellow citizens constantly know and feel the full value of the administration of justice.

Whether Hanna was or was not in failing circumstances is quite immaterial. The judgment against him has been declared valid.—Had he made a payment on that judgment, at any time before his actual failure, it would have been likewise valid, and of course not subject to repetition by the syndics. Such a payment would have been at least equal to any *bona fide* payment he could make in the ordinary course of business.

To maintain that the lien secured to us by our writ of *fieri facias*, could be defeated by the subsequent petition of the creditors of our debtor, is to maintain that the law may be set aside or rendered nugatory by the mere act of individuals who might be interested to oppose its execution. The decision of this

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court, to which I have already referred, sets this point at rest.

Independently of all these reasons, the dates of the transactions referred to, would be sufficient to defeat the pretence set up in opposition to our claim. Our judgment was obtained more than *eight months* previous to the forced surrender. And our statutes specify three months previous to the failure, as the extent of the period during which deeds or judgments given by the insolvent, may be set aside.

MARTIN, J. delivered the opinion of the court. This case comes before us on the appeal of John Day from the decision of the judge *a quo* in dismissing his opposition to the homologation of the tableau of distribution, made by syndics. As by his opposition this creditor contests the claims of the other creditors, it becomes necessary to examine them all.

1. The parish court was certainly correct in allowing Packwood, the insolvent's landlord a privilege on the goods, which the latter had seized to secure the rent due. *Civ. Code*, 468, *art.* 74.

2. Madame Papet's claim was rightfully repelled, as she suffered more than a fortnight

(the legal time) to elapse, after the furniture was removed from her house. *id.*

3. Ogden's heirs were properly allowed a privilege for the goods, in their store occupied by the insolvent, at the time of his failure.

4. Levy and Thomas were justly placed as ordinary creditors for the amount of the judgment, and as privileged ones for the costs, as their judgment was not registered. 1 *Martin's Digest*, 702.

5. Kirk & Mercein's claim does not appear to have been contested.

6. The attachment sued out by Ronaldson cannot avail him. We think with the superior of the late territory, that an attachment gives no lien in case of the defendant's failure. *Marr* vs. *Lartigue*, 2 *Martin*, 89.

7. The judge *a quo* was correct in concluding that the judgment of Gilbert Russel & Co. not having been registered, did not give them a privilege.

8. He did not err in denying a privilege to Lefort, who, in this respect, was in the same situation as the preceding creditor. The *fi. fa.* did not place Lefort in a better situation; for having countermanded the execution of it, and having forbore on its return to keep it

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alive by issuing an *alias*, he cannot claim any advantage under it.

9. Duffy's situation does not materially differ from that of Lefort. The only difference is that the former did not countermand the execution of his *fi. fas.* But they were neither executed nor followed up by *alias*'.

10. Day's claim is resisted on the ground that there is no judgment against Hanna, and if there be it is void, and that the docketing of the judgment creates no lien; that it was not recorded, and if it was it creates no lien; neither does the *fi. fa.*

I. It is true there was no original suit instituted by Day against Hanna; but in a suit brought by the former against *Eeastburn & al.* the latter was summoned and interrogated as a garnishee, and on his oath admitted he owed a certain sum to the defendants, which on the plaintiff recovering judgment he, Hanna, was directed to pay, as part of the sum recovered from the original defendants. Now a garnishee is a party to a suit: when he admits or it is proved, contradictorily with him, that he owes or has effects belonging to the said defendant, and when he is by the court directed to pay, the judgment is as com-

plete against him as against the said defendant. There cannot be any doubt that, if he be ordered to pay what he does not owe, he may appeal.

II. Hanna did not confess judgment. A confession of judgment is essentially a voluntary act. He did what he was compelled to do, and his compliance with the law, in declaring the truth, granted nothing which it was in his power to have withholden.

He had not at the time failed. Now, if his creditors considered it needless to apply for a suspension of legal proceedings against him, such proceedings might well, be continued or commenced against him; and if, before the suspension, they matured into a judgment, we do not see that the creditor can be deprived of the legal consequences of his diligence.

III. We think that the recording, not the docketing of the judgment, creates the lien.

IV. It is certainly true that the contents of an act, in the possession of an officer, while it exists, cannot be proven otherwise than by the production of the original, or his giving a copy of it. He cannot attest its contents or-

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ally, nor by his certificate. A recorder of mortgages, who has recorded a judgment cannot certify its contents, nor perhaps its existence; but he may certify that there is no record of any judgment or mortgage. Indeed, that is the way in which notaries now ascertain the absence of liens; and when the recorder certifies that there is no lien but such and such mortgages, he by a negative pregnant, certifies that such mortgages are registered in his books. He might transcribe all the entries in his book against the property of an individual, and attest that this is all that is against him; but the practice, which is sanctioned by long usage, is to certify that such and such mortgages are registered. We think this suffices without giving a formal transcript of the entries on his books, which could not be more satisfactory. We conclude that the certificate of the recorder of mortgages, shews, in this case, that Day's judgment was recorded.

The effect of the registry of a judgment against a garnishee, who is decreed to pay a sum of money, must have the like consequences as that of a judgment against a party called on to warrant or defend.

The registry, in this case, took place before any stay of proceedings granted.

V. *Leges vigilantibus, non dormientibus serviunt.* The creditors of the insolvent, who laid by, and forbore to exercise their respective rights individually or collectively, cannot defeat the right of him who, while legal proceedings were unstayed, began and continued his, unaided by the common debtor.

It appears to us the parish judge erred in refusing the opposition of this creditor.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court, as far as it relates to the creditors, Packwood, Papet, Ogden's heirs, Levy & Thomas, Kirk & Mecein, Ronaldson, Gilbert Russell & Co., Lefort, and Duffy, be affirmed; but as far as it relates to the opposition of John Day, be annulled, avoided, and reversed; and this court proceeding to render such a judgment, as might herein to have been given in the parish court,

It is ordered, adjudged and decreed, that John Day be placed on the tableau of distribution for the amount of his judgment against the insolvent, as a privileged creditor on the

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land and slaves, from the 7th of June, 1820; on the personal estate from the 8th of August, following; and that the syndics and appellees pay costs on this application in both courts.

*POWERS* vs. *FOUCHER.*

He who affirms must prove unless the plea involves a negative.

In case prescription is pleaded to a right of passage, the party against whom it is offered, must give evidence of those acts, which will take his case out of it.

Particularly if his title commenced so far back as the year 1772, and there is no evidence of his having enjoyed the servitude claimed.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. This action was commenced to obtain and secure the enjoyment of a servitude, which the petitioner avers he is entitled to, on a canal cut through land of the defendants. The title and incidents, connected with it, are minutely detailed in the petition. In the year 1750, one Claude Dubreuil, sen. was owner of a tract of land on the other side of the river, situated about three miles from the city. Desirous of procuring an easy communication with lands which he owned in the rear of this tract, he appropriated an arpent front for that purpose, and cut a canal through it, which he connected with a bayou, the waters of which fall into lake Barataria. The land he afterwards sold to his son; but, in the act of sale, he reserved the arpent front, by forty in depth. In

the year 1772, we find, after several sales, François Bouligny had become the owner of the plantation which Dubreuil, sen. had formerly sold to his son, and also of the other arpent through which the canal was dug; the heirs of Dubreuil, who now owned the land in the rear, having consented he should become so, on certain conditions. These conditions not being complied with, the heirs entered into a compromise, by which they agreed to receive a certain sum in money for the relinquishment of their right to the arpent front; but, with the express reservation, that they, as well as their representatives, should be allowed a free passage through the canal, and on both its banks, whenever they might find it convenient to go to their lands of Barataria; and the servitude should likewise be enjoyed by any person or persons to whom they should happen to sell the said lands. It is this contract that has given rise to the suit now before us. The plaintiff, by various *mesne* conveyances, from the heirs of Dubreuil, is the owner of one of those tracts of land at Barataria, and claims the servitude. The defendant holds the plantation once owned by Bouligny, and refuses it.

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The appellant has called in warranty, Antoine Fouchér, sen. who appeared and vouched the syndics of Degruys, who in turn have cited the heirs of Bouligny.

The heirs of Bouligny appeared, and pleaded that they were called too late, as the trial had been already gone into; that Degruys had bought the land with a knowlege of the incumbrances, and under an express stipulation that he took it with its servitudes. They further denied the right set up by the plaintiff, and if it ever existed and averred it had been lost by prescription.

We have formed an opinion on the last exception, which renders it unnecessary to examine any other point in the cause.

Servitudes, such as that claimed here, were prescribed against, previous to the enactment of the *Civil Code*, by non-user, for twenty years. *Part.* 3, 31, 16.

In this case, the plea offered as an exception, necessarily implies that the plaintiff, for twenty years, had not used the canal, on which he now claims the right of passage—and a question, by no means free from difficulty, is presented for decision. It is to ascertain on

whom the burthen of proof is thrown of the fact necessary to maintain this exception.

The general rule is, that he who affirms should prove. *Part.* 3, *tit.* 14, *lib.* 1. *Phillips' Evidence, ed.* 1820, 149. 9 *Martin*, 48. *Ei incumbit probatio qui dicit non qui negat. Digest, l.* 22, *tit.* 3, *l.* 2. But to this there is the well known exception, that where the affirmative involves a negative, the burthen of proof is thrown on the opposite party, because a negative cannot be proved. *Part.* 3, *tit.* 14, *l.* 2. 2 *Gallison*, 500. 11 *Martin*, 6. 9 *Martin*, 48.

In the case now before us, we find the defendant averring that the plaintiff has forfeited his right by non usage; he would therefore at first appear to come within the rule which requires the party who alleges to support his allegation by proof. But, when we attempt to apply the doctrine to a servitude such as this, we find ourselves at once within the exception just stated. The defendant cannot make the proof; it involves a complete negative.

Hence, we are reduced to adopt one or other of the following alternatives: either we must say that the forfeiture, given by law, on neglecting to use servitudes like this, can, in no instance, be successfully urged by the par-

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ty, where land is burthened with them; or we must refuse our assent to that doctrine which requires him to prove it. For, if we insist on his furnishing evidence of what his adversary did not do, it is the same thing as if we said he shall not have the right to oppose prescription, though the law expressly confers it on him.

We must give the law effect, if it be possible to do so, and there is no other way to accomplish this, but by requiring the plaintiff to furnish evidence of a fact, which if it did take place must be within his knowledge, and which of course he can easily prove. In the cases of *Delery* vs. *Mornet*, 11 *Martin*, 4, and that of *Nichols* vs. *Roland*, *ibid*, 190, we held that the burthen of proof lies on the party who has to support his case by proof of a fact of which he is supposed to be cognisant.

This point of prescription was not argued by the counsel for the defendant, it has been most elaborately discussed by that of the plaintiff, and the industry and research of the gentleman, has brought before the court one case (we can find no other) in which it was held by one of the parliaments in France, that where two communities claimed a right of

servitude, the party who opposed to the other the plea of non-usage, should be held to prove it. It is to be regretted that the report of the decision is not so full as could be wished.— As stated in *Merlin's repertoire de jurisprudence, vol.* 12, 588, 589, it certainly supports the doctrine for which the plaintiff contends.— But it is not of binding authority here, and tho' entitled to great respect, we cannot, where our opinion of the law is so directly opposite, yield our assent to the principles established by it.

As the title of the plaintiff therefore commenced so far back as the year 1772. And there is no evidence before the court of his having enjoyed this servitude for twenty years after, we must hold that it is forfeited by non-usage.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and there be judgment for the defendant with cost in both courts.

*Moreau* for the plaintiff, *Grymes* for the defendant.

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*MORGAN* vs. *ROBINSON.*

If the vendor be a transient person, and withdraws from the state, immediately after the sale, the vendee may bring his action for rescision, after the return of the vendor—though more than the time of prescription has elapsed since the sale.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court.* This is a redhibitory action brought to rescind a contract of sale of certain slaves described in the plaintiff's petition. Fraud is also alleged against the seller. The defendant pleaded prescription to the suit and the general issue. Judgment was given for him in the court below, on his first plea and the plaintiff appealed.

In support of this judgment the appellee relies on the limitation provided against this species of action by the *Civil Code*, 358, *art.* 75, wherein it is declared in positive terms, that whether the object of the suit be to cancel the contract, or to have the price reduced, it ought to be instituted within six months from the date of the sale at the farthest, or from the time that the defects or vices have been discovered; *provided*, that in this latter case not more than one year has elapsed from the time of sale, and after that term the buyer shall not be admitted to said action.

It is shewn by the evidence in the cause

* Martin, J did not sit in this case, having considered the question arising therein, at a time when he had a deep interest in it.

that this suit was not commenced within the year from the date of the sale: but to obviate the bar to his action, as established by law, the plaintiff proves the absence of the defendant from the jurisdictional limits of the state for about eight months of the full year, which commenced with the sale, and expend a little more than one month previous to the institution of this suit.

He relies principally on the maxim, "*contra non valentem agere, non currit prescriptio:*" as adopted and recognized by the Spanish law, and being an axiom or first principle of natural law and justice, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power. In this view of the subject we agree with the counsel of the plaintiff, and notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this universal maxim of justice. The time prescribed by law for commencing a redhibitory action, is six months from the date of the sale, or six months from the discovery of the defects and recovery of the things sold. In the present case, it is shewn that the defendant

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was within the jurisdiction of the state only four months, during the whole year of limitation, and consequently that two months remained for the plaintiff to bring himself within either hypothesis of the law. We are therefore of opinion that the district court erred in sustaining the plea of prescription. The defendant was held to bail on an affidavit made in pursuance of the act of the legislative council, in 1805. An express amount of damages is sworn to, and the affidavit appears to us to be in conformity with the law above cited; and consequently we are of opinion that the judge *a quo* erred also in discharging the bail.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that the bail bond be restored to its full force, &c. And it is further ordered, adjudged and decreed, that this cause be remanded to said district court to be there tried on its merits; as in the opinion of this court, sufficient matter does not appear on the record on which to decide the cause finally, among other deficiencies, there is no evidence to shew the comparative value of the slaves complained of in

this suit, with many others bought at the same time and in the same lot.

*Hennen*, for the plaintiff, and *Grymes*, for the defendant.

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*DENIS* vs. *VEAZEY.*

An obligor on an appeal bond, is not entitled to the plea of discussion.

The surety, on an appeal bond, which is not successfully prosecuted, cannot contest the claim of the plaintiff, liquidated by the judgment, unless on a suggestion of collusion and fraud.

APPEAL from the court of the parish and city of New-Orleans.

MATTHEWS, J. delivered the opinion of the court. This an action brought on an appeal bond, in which the plaintiff sues as attorney for the heirs of Tagan, and prays judgment against the defendant, as surety in said bond, for the amount of a judgment and costs rendered in the parish court against one Delachaux, from which he appealed, and died before any decision was made on the appeal. His heirs were cited to prosecute said appeal and having declined so to do, the present suit was instituted as above stated, and judgment given in the court below in favor of the plaintiffs from which the defendant appealed. He resists the payment of the sum adjudged against him on several grounds. 1. The want of authority in the attorney to sue, in the case in which the first judgment was obtained, and also in this. 2. He claims a division of the

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debt as being only a joint obligation with Delachaux, the principal debtor. Lastly, he insists on the benefit of any error that might be shewn in the judgment against said Delachaux, at the suit of the present plaintiffs and appellees.

In support of the first ground of defence, much reliance seems to be placed on a decision of this court as reported in 10 *Martin*, 16, in the case of *Harrod & al.* vs. *Norris' heirs*, in which it was declared that a person appointed by the court of probates to represent absent heirs in the probate proceeding relative to an estate, could not be considered as representing their interests beyond the purposes for which the appointment was made. In the present case, the letters from the heirs of Tagan to the attorney, who commenced suit for them, ratify and confirm all the steps taken by him in the original action, and preclude the necessity of inquiring into his powers, as derived from the court of probates; but were it necessary to investigate the subject, it is believed that it could be easily shewn that the powers accorded to the attorney in this case differ widely from those granted in the case cited. Here he receives authority from the only tribunal capable of granting it, to sue for and recover

the money belonging to absent heirs for the purpose of having it deposited in the treasury of the state, as required by law; we are therefore, of opinion that the attorney shews sufficient authority to prosecute these actions.

We are also clearly of opinion, that from the nature of this obligation, the appellant is not entitled to division or discussion. In all judicial bonds or obligations, the surety has not the privilege of claiming a discussion of his principal's property. *See Civil Code*, 434, *art.* 29.

When one person becomes surety for another, that the latter will do a certain thing, or pay a certain sum of money, the surety is bound to the full extent of his principal, having the benefit of discusion as provided for by law in ordinary cases; but in judicial obligations, as this benefit is denied him, such obligations necessarily become joint and several, and neither admit of discussion nor division.

The last defence of the appellant seems to us to have been settled, in refusing the application, heretofore made in this court, on his part to prosecute the appeal for his principal in the appeal bond, after the heirs of the latter

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had refused to proceed, and after the appeal had been dismissed.

By the abandonment of the appeal on the part of Delachaux and his heirs, the appeal bond was forfeited, and the measure of damages to which the surety was subjected, is ascertained by the original judgment and costs, which he has no right to inquire into, unless on a suggestion and proof of fraud and combination to cheat him, between the parties to the suit, in which he has bound himself as surety on the appeal: as nothing of this sort is shewn in the present case, we conclude that the judgment of the judge *a quo* ought to be affirmed with costs.

*Denis* for the plaintiff, *Conrad* for the defendant.

*FLOGNY* vs. *HATCH & AL.*

A demand of a debt, due by the wife, may be made on her.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. This action was commenced on a note made by Pamela Hatch, before her marriage with Sylvanus Hatch, and is brought against

husband and wife, and Meriam, who was security. The signature of the parties, to the obligation, is proved, and the existence of the debt established beyond doubt. A question, as it respects costs, was agitated on the trial, and is the only one which the counsel for the appellant has thought necessary to discuss before us. He contends that a demand on the wife for payment, is not sufficient that it should also be made on the husband.

The act on this subject, 2 *Martin's Digest*, 196, provides that an amicable demand shall be made on the person of the debtor, either verbally or in writing. The only enquiry then, in the case before us, is who was debtor—husband or wife? The law has furnished the answer—husbands are not responsible for the debts of their wives, contracted before marriage, nor wives for those of their husbands; each must be acquitted out of their own personal and individual effects. *Civil Code*, 336, *art.* 65. The plaintiff has, therefore, strictly and literally complied with the requisitions of the statute, and we do not see any thing in the circumstance of its being necessary to cite the husband, to aid the wife in defending the suit, that at all affects the regularity of the proceedings.

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But we are of opinion that the judge of the district court erred in giving judgment against Sylvanus Hatch, as it is neither alleged nor proved that he bound himself to pay the debt, and we have already seen it must be satisfied out of the wife's effects. *Civil Code, loco citato.* As it respects Pamela, and the other defendant Meriam, we discover no error in the decision.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the plaintiff do recover of Pamela Hatch, and N. Meriam, defendants, the sum of $984 50 cents, with interest from the judicial demand, and the costs in both courts—and it is further ordered, that execution shall not issue against the said N. Meriam until the property of the principal, Pamela Hatch, is discussed according to law.

*Morse* for the plaintiff, *Workman* for the defendant.

*MADEIRA & AL.* vs. *TOWNSLEY & AL.*

The degree of diligence, required of an agent, who receives

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the

court. The plaintiffs in this action had a claim on William Noble for $6323 15 cents, evidenced by his note of hand for that sum, and, in order to secure the payment of it, they forwarded directions to the defendants to attach the steam boat Paragon. In pursuance of those directions the boat was seized, on her arrival in this port, and after some time had elapsed, the appellees believing that the debt could be more speedily recovered by releasing the attachment, and taking other property, entered into an arrangement with the house of Noble & Wilkins, by which they agreed to receive 1500 bbls. of flour under the conditions expressed in the following agreement.

compensation for the business he transacts, is that which a prudent man pays to his own affairs, what is called in law ordinary diligence.

"Thomas F. Townsley & Co. agree to receive from Messrs. Noble & Miller, 1500 bbls. of flour, fresh, and to pass inspection as fine and superfine: the same to be deposited with T. F. Townsley & Co. for sale, and to be sold within sixty days from this date and on a credit not exceeding four months, in notes approved by the parties. Thomas F. Townsley & Co. to charge but one and one-fourth per cent commission on the sales."

"The above is given to secure the payment

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of William Noble's note sent for collection by G. A. & J. Madeira, amounting to $6323 15 cents, exclusive of interest, &c. In the event of the proceeds of the flour not covering the sums above stated, Messrs. Noble & Miller will immediately pay the balance to Thomas F. Townsley & Co. without defalcation."

Immediately after this arrangement was concluded, the defendants communicated it to the plaintiffs, and in a short time after received a letter, from the latter expressing their perfect satisfaction of the course they had pursued.

The flour was not sold within the sixty days, as specified in the agreement, and in consequence thereof this action has been instituted in which the plaintiffs allege, that the defendants, by keeping the property on hand, for a longer space of time than the period specified in the agreement, have discharged Noble & Wilkins from their engagement, and deprived the plaintiffs of all recourse on them. That this detention was an act, unjustifiable, exhibiting negligence and a want of that care and attention, which as agents they owed to the affairs of their principal; that by reason thereof, the flour was ultimately sacrificed at

$1 50 cents per bbl. when, if sold in due season, it would have brought from four to five. They therefore pray that they may have judgment for the difference in amount, between the sum produced by the sale of the flour and the note forwarded for collection.

The defendants pleaded the general issue, and there being judgment in their favor, the plaintiffs have appealed.

The degree of diligence which is required of an agent, who receives compensation for the business he transacts, is that which a prudent man pays to his own affairs, what is called in law, ordinary diligence, and which of course creates a responsibility for ordinary neglect. We find it stated it is true, in the *Curia Phillipica* that a factor is liable for *levissima culpa*, *Curia Phil. lib. Factores, cap.* 4, *no.* 40, but that expression, when used in the Spanish language, is expressly declared to mean that species of neglect we have just described "*Otrosi decimos que y a otra culpa a que dizen leuis, que es como pereza, o como negligencia. E otro y cha a que dizen levissima, que tanto quiere decir, como non auer ome aquella fenencia en aliùar e guardar la cosa que otre ome de buen seso auria, si*

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*la ténuisse.*" *Part.* 7, *tit.* 33, *law* 11 : where a man does not use the same diligence in administering and taking care of a thing, which another man of good understanding would use, if it belonged to himself.

Agents, however, should pursue the instructions they receive, and like all others they must comply with their engagements, or be responsible for a violation of them. In the case before us, the appellees undertook to sell the flour within a limited time, and they have not done so. It follows, as a consequence, that if it was practicable to dispose of the property within the period agreed on, the plaintiffs have lost their recourse against Noble & Miller, and consequently the defendants must be responsible to them for all damages, which they have sustained by losing that recourse. This is the gist of the action, and on the correct solution of the question, presented by the evidence in relation to the possibility of making the sale, depend the rights of the parties now before us.

The testimony taken is voluminous and is spread over between thirty and forty pages of the record. It is impossible to abridge it, so as to convey truly the impression made by an

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attentive perusal of the whole, as given on trial. We have duly and deliberately weighed it, and are of opinion that it was out of the power of defendants to have disposed of the property within the limitation expressed in the contract; unless they had sent it to auction, which we think they were not authorised to do.

This point disposed of, it is established beyond doubt that their conduct afterwards was that of honest men, diligent in the discharge of their trust, and anxious to do every thing in their power to promote the interest of their principal. It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

*Maybin* for the plaintiff, *Grymes* for the defendant.

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*SHUFF* vs. *CROSS.*

If one give a quantity of pork and some money for the note of a third party, he has no recourse, on the note not being paid.

APPEAL from the court of the first district.

PORTER J. delivered the opinion of the court. The evidence clearly establishes that the contract entered into by the parties to this suit was one of "Exchange." which is de-

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fined to be a transaction "where the contractors give to each other, one thing for an other, whatever it be, except money." *Civil Code*, 370, *art.* 1. In the case before us, the plaintiff and appellee gave fifty three barrels of pork, and a small sum in money, for a note of one William S. Brown, indorsed by Joseph Byrnes.

This obligation proving of no value, both maker and indorser having become insolvent, we are called on to decide whether the defendant must not pay for the property he received for it.

In the contract of exchange, each of the parties is individually considered as vendor and vendee. *Code*, 370, *art.* 8. What then are the obligations of him who disposes of an incorporeal right? Positive law has defined them;—"he who sells a debt, or an incorporeal right, warrants its existence at the time of the transfer." *Civil Code*, 368, *art.* 125. But he does not warrant the solvency of the debtor unless he has agreed so to do, *idem* 126, *Pothier*, *traite de vente*, *no.* 560, *Digest*, *Liv.* 21, *tit.* 2, *Loi* 74, *No.* 3. No such agreement is proved here, and the evidence has failed to establish fraud.

The case of *Gordon & al. vs. Macarty*, 9 *Martin*, 268, was one where a debt already existed, and was therefore decided on principles of law, which have not any application to contract such as this.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and that there be judgment for defendant with costs in both courts.

*McCaleb* for the plaintiff, *Ripley* for the defendant.